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IN THE

Supreme Court of the United States

October Term, 1956

No. 33

MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

Brief in Opposition to Petition for Certiorari and in Reply to Brief of Amicus Curiae.

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IN THE

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MICHAEL WILSON, *et al.*,

Petitioners,

vs.

LOEW'S INCORPORATED, a corporation, *et al.*,

Respondents.

Brief in Opposition to Petition for Certiorari and in Reply to Brief of Amicus Curiae.

Preliminary Statement.

First: The record which petitioners have caused to be prepared does not contain the material necessary to ascertain when and in what circumstances the constitutional question posed here was raised below. Accordingly, we have filed with this brief, pursuant to Rule 21(6), a supplemental record (hereinafter referred to as "Supp. R.") containing that material. From this record it will be seen that the constitutional question was not raised in the trial court; and that it was not raised on appeal until after the cause had been decided on the merits.[1] Never-

[1] In California practice, questions are raised on appeal in the briefs of the parties. [*Epperson v. Rosemond*, 100 Cal. App. 2d 344, 347, 224 P. 2d 480; *California Portland Cement Co. v. Boone*, 181 Cal. 35, 43, 183 Pac. 447, 450-451; *Grayson v. Grayson*, 132 Cal. App. 2d 471, 282 P. 2d 565.] Accordingly, the supplemental record which we have caused to be prepared contains the briefs in the District Court of Appeal. The Clerk did not number the pages of this record consecutively. So, references are to the pages of the particular document indicated.

theless, at page 9 of the petition, without supporting reference to the record, petitioners say that they urged on appeal to the state court the contention "that the judgments of the Superio. Court deprived petitioners of their liberty to pursue their chosen callings in violation of the applicable provisions of the state Constitution and the Fourteenth Amendment. . . ." That statement is misleading in so far as it conveys the impression that the question was seasonably raised. Actually, the existence of such a question was suggested for the first time in the case in a petition for rehearing filed after decision on the merits by the District Court of Appeal. [R. 184-187.] The same suggestion, along with a number of other points, was made in a subsequent petition for hearing in the state Supreme Court after decision by the District Court of Appeal. [R. 225-228.] In respect of the constitutional question, each of those petitions was resisted by respondents on the ground, among others, that the question was raised too late. [Supp. R. (Ans. to Pet. for Rehear.) 4-5; (Ans. to Pet. for Hearing) 12.] The petitions were denied without opinion. [R. 199, 275.] It cannot, therefore, be said that the federal question was decided below. For all that appears in the record here, that question might have been by-passed solely because of the untimeliness of its presentation.

Second: Petitioners treat their complaint as adequately alleging facts showing that "by reason of the acts and pursuant to the agreement of respondents, petitioners have been refused and excluded from employment in the industry. . . ." [Pet. 12.] The state court did not so read the complaint. Rather, it held that the complaint alleged only that at some unspecified time before the re-

spondents had made the agreement complained of, the petitioners had been employed in the motion picture industry; that it was not shown when or why that employment had been terminated, but the necessary inference was that it had ended as the result of facts wholly disconnected from the agreement and that those facts were still effective. So, the court concluded, it could not be inferred from the complaint that the alleged unlawful combination was the cause of petitioners failure to obtain employment. [Pet. App. A, 15-17.]

Thus, we see that the lawfulness of respondents' agreement was not decided below. The question which was decided was whether persons, who had not been shown to have lost employment or an employment opportunity as the result of an alleged tortious agreement restricting employment, had any standing to complain and obtain relief in respect of that agreement. That is quite a different question from the one which petitioners now urge, postulated, as the latter question is, on the assumption that petitioners' failure to obtain employment was the result of the respondents' allegedly unlawful agreement.

Manifestly, the question actually decided below has none of the constitutional implications which petitioners and *amicus curiae* purport to find in the case. [*Cf. McCabe v. A. T. & S. F. Ry. Co.*, 235 U. S. 151, 162-164; *Tileston v. Ullman*, 318 U. S. 44.] Nevertheless, when we reach the substantive merits of their argument [Points II, III; *infra*] we shall treat the problem on the footing upon which they seek to place it. Yet, it is apparent that if certiorari were granted, consideration of the cause on the merits could only lead to the conclusion that the

question raised in the petition was not really involved.[2] In that event, dismissal of the writ as improvidently granted would be the appropriate and likely order. [See, *e.g., Ellis v. Dixon*, 349 U. S. 458.] There is, therefore, no sound reason to issue the writ.

Third: In California practice a demurrer admits only the facts well-pleaded. It does not admit conclusions of the pleader or argumentative or epithetical averments. [*Faulkner v. California Toll-Bridge Auth.*, 40 Cal. 2d 317, 329, 253 P. 2d 659, 667; *Bentley v. Mountain*, 51 Cal. App. 2d 95, 98, 124 P. 2d 91, 93; *Gosewich v. Doran*, 161 Cal. 511, 515-516, 119 Pac. 656, 658.] Nor does

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[2]The construction to be given a pleading and the question whether a complaint states a cause of action under state law are, of course, matters of local law not reviewable here. [*Vandalia Railroad v. South Bend*, 207 U. S. 359, 367; *Osborne v. Gray*, 241 U. S. 16, 20; *Chicago etc. Ry. v. Whiteaker*, 239 U. S. 421, 424; *Washington v. Miller*, 235 U. S. 422, 429.] When a federal question is raised in a state court, this Court on review may decide for itself whether the facts alleged are sufficient. [*Ellis v. Dixon*, 349 U. S. 458, 463-464; *Brown v. Western Ry.*, 338 U. S. 294, 296; *Ward v. Love County*, 253 U. S. 17, 22.] But that only means that a federal right cannot be evaded or its assertion made difficult by local practice. [*American Ry. Exp. Co. v. Levee*, 263 U. S. 19, 21; *Davis v. Wechsler*, 263 U. S. 22, 24-25.] It does not mean that the state courts are not free to decide questions of local practice as they will, when only local rights are put in issue. At bar, there was no assertion in the trial court, or in the District Court of Appeal until after the latter court's decision, of any federal right. So, there was no evasion of any federal question. Consequently, the state court's reading of the complaint should be conclusive here. [See, *Osborne v. Gray, supra*, 241 U. S. at 20-21; *Zorach v. Clauson*, 343 U. S. 306, 311 (note 7); *Nickel v. Cole*, 256 U. S. 222, 225; *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651, 655; *Long Sault Development Co. v. Call*, 242 U. S. 272, 277.]

it admit allegations contrary to facts judicially noticed; for such facts are deemed included in the complaint. [*Chavez v. Times-Mirror Co.*, 185 Cal. 20, 23, 195 Pac. 666, 668; *Hammell v. Britton*, 19 Cal. 2d 72, 75, 119 P. 2d 333, 334-335; *Weil v. Barthel*, 45 Cal. 2d 835, 837, 291 P. 2d 30, 31.] On demurrer the complaint will be liberally construed; but it will still be deemed to state the strongest case open to the pleader. [*Faulkner v. California Toll-Bridge Auth, supra*, 40 Cal. 2d at 328, 253 P. 2d at 666, and cases there cited.] Allegations not made will not be added by strained construction. [*Estrin v. Superior Court*, 14 Cal. 2d 670, 677, 96 P. 2d 340, 343.]

From the application of these rules of California practice the state court arrived at the interpretation of the complaint to which we have already referred. [Par. *Second, supra.*] It also concluded, from its judicial notice of the proceedings of the House Committee on Un-American Activities,[3] that the questions which petitioners had refused to answer before that Committee did not relate to their "political affiliations, associations or beliefs" but did concern their membership in the Communist Party.[4]

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[3]In California the courts take judicial notice of the "Public and private acts of the legislative, executive and judicial departments . . . of the United States. . . ." [*Cal. Code of Civil Procedure*, Sec. 1875(3). See, also: *Arnold v. Universal Oil Land Co.*, 45 Cal. App. 2d 522, 529, 114 P. 2d 408, 413; *Parker v. James Granger, Inc.*, 4 Cal. 2d 668, 677, 52 P. 2d 226, 230, *cert. den.* 298 U. S. 644; *El Zarape etc. Factory v. Plant Food Corp.*, 90 Cal. App. 2d 336, 203 P. 2d 13.]

[4]Petitioners concede that the Communist context out of which this case arose played no part in the result. [Pet. 10, note 1a.]

Jurisdiction.

Jurisdiction is invoked under 28 U. S. C., Sec. 1257(3). It does not, however, exist for the reasons indicated above and set forth below at length. [Point I, *infra*.]

Question Presented.

The respondents were alleged to be in the business of producing and distributing motion pictures and to control, directly or indirectly, all employment opportunities in that industry. Petitioners were alleged to be actors, writers and others who at one time or another had been employed in the industry. It was not alleged that they were so employed at or near the time of the conduct complained of, or that they were then seeking or negotiating for, or had any reasonable prospect of obtaining, such employment. Some time after petitioners were last employed, the respondents allegedly agreed that they would not employ persons who, (a) having been called to testify before the House of Representatives Committee on Un-American Activities, refused on constitutional grounds, including self-incrimination, to answer questions concerning their political affiliations, associations and beliefs; or, (b) having been named as Communists before the Committee refused and failed to appear before it, waive and surrender their constitutional rights and testify as to their political affiliations, associations and beliefs and those of their families, friends, associates and acquaintances. After this agreement had been made, certain of the petitioners were called before the Committee and there refused to answer questions concerning their membership

in the Communist Party; and the others, having been named before the Committee as Communists, refused to appear and testify in respect of that subject. As a matter of state tort law, and before any question of federal due process or equal protection had been raised, the court below held that a complaint alleging the foregoing facts failed to state a cause of action for unjustifiable interference with business relations because the petitioners had not shown that they had an existing or reasonably prospective employment which was interfered with, the existence of such a present or prospective interest being an essential element of a cause of action for relief in respect of the tort which it was claimed had been committed.

In these circumstances the federal question here attempted to be presented is this: Did the state court deny petitioners substantive due process or equal protection in thus defining the elements and limits of the tort in respect of which relief was sought?

ARGUMENT.

I.

The Federal Question Now Presented Was Not Seasonably Raised Below and It Was Not There Decided.

This Court is without jurisdiction of the cause because the federal question which it is now sought to have reviewed was not timely raised below in accordance with the state practice; and it was not, in any event, decided.

First: The question was not raised at all in the trial court. [R. 2-108; Supp. R. (Op. Br. for Plaintiffs-Appellants) 1, 7.] This in itself, precluded review of it in the state appellate courts.[5] [*Imperial Valley L. Co. v. Globe Grain etc. Co.*, 187 Cal. 352, 359, 202 Pac. 129, 131-132; *Herbert v. Lankershim*, 9 Cal. 2d 409, 484, 71 P. 2d 220, 257.] It is similarly non-reviewable here. This Court "is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. . . ." [*Edelman v. California*, 344 U. S. 357, 358. To the same effect: *Mutual Life Ins. Co. v. McGrew, supra*, 188 U. S. at 308-309; *Bailey v. Anderson*, 326 U. S. 203, 206-207; *Hulbert v. Chicago*, 202 U. S. 275.]

Second: The question was first raised, if at all, in the petition for rehearing filed after decision by the District Court of Appeal. [R. 184-187, 233.] According to Cali-

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[5]This rule of California practice is recognized in *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 309.

fornia practice that was too late to require consideration or decision of the question by the appellate courts. [*Prince v. Hill*, 170 Cal. 192, 195, 149 Pac. 578, 580; *Sanders v. Howard Park Co.*, 86 Cal. App. 2d 721, 723, 195 P. 2d 898, 899.] It follows that the denial of that petition, as well as of the petition for hearing in the state Supreme Court,[6] might well have been based on that ground, or upon the failure to raise the question in the trial court. [*Stembridge v. Georgia*, 343 U. S. 541, 547, and cases there cited.] This would be an adequate state ground for the result in the cause; and "when the question of the existence of an adequate state ground is debatable" this Court is without jurisdiction. [*Stembridge v. Georgia, supra*, 343 U. S. at 547-548; *Durley v. Mayo*, 351 U. S. 277, 281-282, 285; *Bachtel v. Wilson*, 204 U. S. 36, 41-42.] In fact, the contrary not appearing from the record, it must be assumed that decision below was placed on the state ground. [*Bailey v. Anderson, supra*, 326 U. S. at 206-207.] Furthermore, the "long-established general rule is that the attempt to raise a federal question after judgment [in the state appellate court], upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it. . . ."[7] [*Herndon*

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[6]The proper court to which to direct the certiorari is the District Court of Appeal. [*Hammerstein v. Superior Court*, 341 U. S. 491, 492.] It is, therefore, immaterial why the state Supreme Court may have denied the petition for hearing. [*Ibid.*]

[7]There can be no proper claim that the existence of a federal question could not have been foreseen in advance of the District Court of Appeal's decision. [*Cf. Missouri v. Gehner*, 281 U. S.

v. Georgia, 295 U. S. 441, 443, and cases there cited; *Forbes v. State Council of Virginia,* 216 U. S. 396, 399; *Mergenthaler Linotype Co. v. Davis,* 251 U. S. 256, 258-259.]

Third: The record does not affirmatively show that the federal question was decided below. Yet, unless such an affirmative showing is made this Court will not take jurisdiction. [*Bailey v. Anderson, supra,* 326 U. S. at 207, and cases there cited; *American Ry. Express Co. v. Kentucky,* 273 U. S. 269, 272.] And, if there is any doubt that a constitutional question was decided below, that interpretation of the record will be adopted which will avoid the necessity of deciding the constitutional issue. [*Armstrong v. Armstrong,* 350 U. S. 568, 569; *Black v. Cutter Laboratories,* 351 U. S. 292, 299-300.]

313, 320.] The substantive law ground upon which the cause was decided in the District Court of Appeal was urged by respondents in the trial court and was vigorously renewed as a ground of affirmance on appeal. [Supp. R. (Resp. Br.) 15-24, 78-79.] If acceptance of that ground by the state court would precipitate the constitutional question now posed, that fact was or should have been known to petitioner's as soon as the ground was urged. The first opportunity to advance the constitutional contention, therefore, arose in the trial court not later than the hearing of respondents' demurrer. The opportunity presented itself again, long before decision in the District Court of Appeal, when petitioners filed their brief in reply to respondents' presentation. Nevertheless, petitioners remained silent in this regard on each of those occasions, although they replied at length to respondents' point on substantive, state grounds. They waited until decision had gone against them in both state courts before suggesting the existence of a federal question.

II.

There Is No Federal Question Involved at Bar but Only a Question of the Correctness of a State Court's Decision of Local Law. Such Federal Implications as May Be Involved in That Decision Are Without Substantiality.

Petitioners complain that by the acts of the respondents they have been prevented from pursuing their respective callings in the motion picture industry; and that this consequence of *private* action must be remedied by the state.[8] Petitioners may pursue their calling in one of two ways—by engaging in it as independent entrepreneurs; or by procuring employment from other entrepreneurs such as respondents. The first alternative has not been denied them by any act of respondents or by the decision below. The second alternative, of course, requires the contractual concurrence of others, equally possessed with petitioners of freedom of contract. In this respect petitioners have been told by the state court only that California leaves the making of such contracts to the interplay of the parties' bargaining and economic forces.[9]

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[8]Whether this case presents any question of *state* action—to which alone, of course, the Fourteenth Amendment applies [*Shelley v. Kramer*, 334 U. S. 1, 13; *Civil Rights Cases*, 109 U. S. 3, 10-11] —is a matter which petitioners ignore. [See, Point III, *infra*.] For the purpose of this part of our argument, however, we may assume that the conduct complained of is attributable to the state.

[9]In all accuracy, the decision below did not go even that far. It only went so far as to hold that petitioners had no standing to complain of respondents' conduct because no interest of petitioners was affected by that conduct. [Pet. App. A, 15-17.] Whether one, who has lost an existing or prospective employment as the result of that conduct, would have a remedy is a question not involved or decided below. Even so, we may assume, for purposes of argument, that petitioners were adversely affected by respondent's agreement and that the state has not provided any remedy in the premises. Thus we meet head-on the question which petitioners discuss, but which is not really in issue here. [See, *Preliminary Statement*, par. *Second*, *supra*.]

The question whether a state may constitutionally adopt such a policy of freedom of contract—or, more accurately, whether the state courts are *compelled* by the constitution to reject such a policy—is without substantiality. Petitioners' argument really comes down to nothing more than a complaint that the state court erroneously declared its common law.[10] Even if the state court did err in so declaring (but see note 10, *supra*) no federal question would exist. The Fourteenth Amendment assures neither uniformity of decision nor freedom from judicial error in the determination of questions of local law. [*Milwaukee Elec. Ry. Co. v. Milwaukee*, 252 U. S. 100, 106.]

First: The question whether a cause of action in tort shall be recognized in respect of an agreement by employers not to employ persons who have conducted themselves in a given way is obviously one of local law. [*Black v. Cutter Laboratories, supra*, 351 U. S. at 299; *Neblett v. Carpenter*, 305 U. S. 297, 301-302; *American Ry. Express Co. v. Kentucky, supra*, 273 U. S. at 272-273; *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389, 393-394.]

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[10]The tort of interference with business relations is not defined in any California statute. It is there a creation of the courts, as it is at common law. It was first recognized, in limited scope, nearly seventy-five years ago. [*Boyson v. Thorn*, 98 Cal. 578, 33 Pac. 492.] The early limitations have now disappeared; and the doctrine exists in California substantially in its common law form. [*Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P. 2d 631; *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P. 2d 867.] But along with that expansion there was also recognition of one basic limit—that it must appear that but for the alleged interference the business relation involved would have been entered into or continued as the case might be. [*Campbell v. Reyburn*, 129 Cal. App. 2d 232, 234-235, 276 P. 2d 671, 672.] It was that principle which was given effect in the instant case. [Pet., App. A, 9-17.] It is not a principle unique to California; but is one uniformly recognized elsewhere. [See, *Annotation*, 9 A. L. R. 2d 228, 256-257, where the cases are collected.]

It is immaterial whether the state court was right or wrong on that question. An erroneous decision of a question of local law raises no federal question; and this Court is without power to review it. [*Tracy v. Ginsberg*, 205 U. S. 170, 177-178; *Central Land Co. v. Laidley*, 159 U. S. 103, 112; *McDonald v. Oregon Navig. Co.*, 233 U. S. 665, 669-670; *Arrowsmith v. Harmoning*, 118 U. S. 194, 196; *Gryger v. Burke*, 334 U. S. 728, 731.]

Second: "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . ." [*Nebbia v. New York*, 291 U. S. 502, 537.] That is just as true of policies which may be thought to be reactionary or conservative as it is of those which have been challenged because of their supposed radicalism; for the wisdom or desirability of any given state policy is not a matter for this Court's determination.[11] [*Daniel v. Family Sec. L. Ins. Co.*, 336 U. S. 220, 224; *Lincoln Federal L. U. v. Northwestern I. & M. Co.*, 335 U. S. 525, 536-537.] To hold otherwise would require a reversion to what this Court has called the "Lochner-Coppage-Adkins philosophy." [*Day-Brite Lighting v. Missouri*, 342 U. S. 421, 423.] But if, as the repudiation of that philosophy has now made certain, the Fourteenth Amendment did not enact Mr. Herbert Spencer's Social Statics [Holmes, J., diss., *Lochner v. New York*, 198 U. S. 45, 75], it has also made certain that the amend-

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[11]We assume, when its constitutionality is called in question, that a rule or doctrine enunciated by a state court stands on the same footing as an act of the legislature. [See, *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 548; *Hughes v. Superior Court*, 339 U. S. 460, 466-467.]

ment did not adopt any other economic or social theory to which the states must conform.

In its broadest implications, the decision below was that employers are free to agree with each other upon terms and conditions of employment, one of which may be employees' obedience to appropriate inquiries of governmental investigators.[12] [But see note 9, *supra.*] Whatever one may think of the wisdom of that policy, it clearly comes within the wide range of choice open to the state. Freedom of contract cannot be violative of a constitutional provision which guarantees it.

What California has chosen as its policy in this regard is complete freedom of bargaining in respect of employment and employment opportunities. It has elected to "rely for the common good on the free play of conflicting interests and leave conduct unregulated. . . ." [*Hughes v. Superior Court, supra,* 339 U. S. at 468.] To be sure, the state need not have done so. With constitutional propriety it might have adopted a more restrictive policy which would outlaw agreements such as the one here complained of. But the constitution does not *compel* it to do so. Or, as this Court, in another connection, has expressed the same thought, the state "may protect from the consequences of competition but the Constitution

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[12]California, which early recognized the right of employees to combine for purposes of exerting economic force in bargaining [*Parkinson Co. v. Building Trades Council,* 154 Cal. 581, 98 Pac. 1027], has also recognized the employers' right to do the same. [*Speegle v. Board of Fire Underwriters, supra,* 29 Cal. 2d at 40, 172 P. 2d at 871.]. Does the constitution compel California to accord a cause of action to an employer who has been prejudiced in some way by a concerted agreement of employees fixing the terms and conditions upon which they will work; or does the constitutional compulsion which petitioners find extend only to concert of action by employers?

does not. . . ." [*Puget Sound P. & L. Co. v. Seattle*, 291 U. S. 619, 624.]

The fact that the Fourteenth Amendment does not prohibit various types of enactments which curtail or restrict freedom of contract or individual liberty does not mean that the states are inexorably required to make such enactments. Examples to that end are not wanting. Thus, a state may constitutionally prohibit or regulate monopolies. That does not mean that it is required to do so. [*Nebbia v. New York, supra*, 291 U. S. at 529; *Slaughter House Cases*, 16 Wall. (83 U. S.) 36.] It "may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. . . ." [*Milk Wagon Drivers U. v. Meadowmoor Dairies*, 312 U. S. 287, 295.] It may impose upon an employer punitive damages for wrongful death without regard to malice, oppression or personal fault. [*Pizitz Dry Goods Co. v. Yeldell*, 274 U. S. 112.] But the opposite policy is equally open to it. [See, *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101.] It may abolish common law doctrines such as the fellow-servant rule, contributory negligence and assumption of risk. [*New York Cent. R. R. Co. v. White*, 243 U. S. 188.] Yet no one would argue that it must take that course. A state may permit an injunction to stop picketing to compel employment without racial quotas. It does not have to go so far; and even if it does it need not forbid voluntary adoption of quotas by employers. [*Hughes v. Superior Court, supra*, 339 U. S. at 464-466, 468-469.]

And so with almost every type of regulatory or socio-economic statute or rule whose constitutionality has been

upheld. The constitutional right of the states to enact such legislation or to enforce such rules of law has not been transformed by the Fourteenth Amendment into a command that they do so.

Third: In realistic appraisal, the court below did no more than apply to the facts at bar the familiar common law doctrine of interference with business relations. [Cases cited, note 10, *supra.*] There surely can be no substance to a claim that substantive due process has been denied by adherence to such a widely followed rule of the common law.

Even if the decision represented a departure from the common law, no substantial question of due process would be raised. The states may still create new rights or abolish or modify old ones recognized by the common law. [*Silver v. Silver,* 280 U. S. 117, 122; *New York Cent. R. R. Co. v. White, supra,* 243 U. S. at 198-200, 206; *Wilmington Min. Co. v. Fulton,* 205 U. S. 60, 74.] Having done so, and thereby having made certain conduct lawful, there is no constitutional right to a "remedy" in respect of that conduct. [*Senn v. Tile Layers etc. Union,* 301 U. S. 468, 482-483.]

Fourth: The claim of a denial of equal protection is also without substance. Classification based upon legitimate differences between the classes is not prohibited by the Fourteenth Amendment. [*Jones v. Union Guano Co.,* 264 U. S. 171, 181; *New York R. T. Corp. v. New York,* 303 U. S. 573, 578; *Goesaert v. Cleary,* 335 U. S. 464.] Here, the differences between the classes are apparent and significant. On the one hand are those who have an existing or reasonably prospective employment or business relation. On the other are those who do not. The former have a cause of action for unjustified interference

with that employment or relation, because they have an immediate or existing interest which is affected to their detriment by the interference. The others do not have a cause of action because no such interest is affected and because, therefore, no injury or damage has been done them. To make the existence of a cause of action depend on whether some interest of the plaintiff has been injuriously affected by the conduct of the defendant, is not only proper classification; it is to apply to the instant situation the usual and universal criterion which distinguishes the moot or academic controversy from those of which courts will take cognizance.

Even if it be said that the facts bring petitioners within the class of those who have an existing or prospective interest, they have been deprived of no constitutional right by the decision below. We would then have only an erroneous application of a correct principle of law to the facts. Such error in a matter of local law is not a denial of equal protection. [*Worcester County Trust Co. v. Riley*, 302 U. S. 292, 299; *Milwaukee Elec. Ry. Co. v. Milwaukee, supra*, 252 U. S. at 105-106. See also, the cases last cited Point II, *First, supra.*]

Fifth: A major fallacy in petitioners' argument is that they are arguing a question which was not and did not have to be decided. [See, *Preliminary Statement*, par. *Second, supra.*] Another fallacy is that their argument necessarily assumes that a policy of anti-monopoly and restricted freedom of choice of one's employees has been made a constitutional absolute which everyone—private citizen as well as the state—must adopt and enforce. All this has been set forth at length above. An additional word or two may be said about some of petitioners' specific contentions.

The right to pursue a calling is, of course, one of the liberties protected by the Fourteenth Amendment against arbitrary *state* action. But that right does not impose upon anyone else, with an equal right to pursue his private business, the duty to employ one whose calling requires employment by another. The right to work is not the right to work for any specific employer. [*Cf.*, *McAuliffe v. Mayor,* 155 Mass. 216, 29 N. E. 516, Holmes, J., writing for the court. *Cf.*, also the position of *amicus curiae* in the case at bar with that taken by it a short time ago in protesting the discharge of an actress. At that time, as quoted in one of its own reports (Miller, The Judges and the Judged, p. 18), the A.C.L.U. said that the actress had "no constitutional right to appear" in a given dramatic production.]

The short of the matter is that conduct of the sort here complained of has not been made unlawful by the state. That it could have been made unlawful we need not deny. No doubt some, perhaps many, persons believe, as a matter of policy, that it should be. Petitioners' argument is nothing but a marshaling of reasons supporting such a policy. But the choice of policy was and is a matter for the appropriate department of the state government. It is not for the Federal courts to make or unmake the state's policy in this regard. Nor has the Congress—assuming it had the requisite power [but see, *Civil Rights Cases, supra,* 109 U. S. 3]—attempted to do so. The Civil Rights Act [18 U. S. C., Sec. 241] certainly does not. It is applicable solely to rights and privileges created and secured by the constitution against

private interference; not to those, such as Fourteenth Amendment rights, which are constitutionally secured only against state interference. [*United States v. Williams*, 341 U. S. 70, 77-78; *United States v. Cruickshank*, 92 U. S. 542, 551-555; *Hodges v. United States*, 203 U. S. 1, 14-20.]

No doubt the self-incrimination privilege secured by the Fifth Amendment is safe against restrictions or encroachments by the states or even by the Federal government. But private reactions which resort to that privilege may induce are quite another matter. The constitution secures to an individual free use of the privilege, in order that criminal charges against him shall be proved by evidence other than his own. [See, *Quinn v. United States*, 349 U. S. 155, 161-162.] It does not, and government need not, attempt to secure him against social disfavor or economic disadvantage which its use may produce. [See, *Ullman v. United States*, 350 U. S. 422, 430-431, 454.] Here, again, it may well be within the range of permissible state or Federal policy to attempt to protect against those practical and private consequences. As yet, the policy-making branches of government have not seen fit to do so.

Sixth: The foregoing criticism is equally applicable to the brief of *amicus curiae*. An additional appropriate comment upon that brief is that it is wholly irrelevant. It consists, in part, of a discussion of a question—*i.e.*, applicability of the guaranty of free speech—which even the petitioners do not seek to raise. It is not the office of an *amicus curiae* to inject new or different questions

into a case. [*Moffatt Tunnel Imp. Dist. v. Denver & S. L. Ry.* (10 Cir.), 45 F. 2d 715, 722, *cert. den.* 283 U. S. 837.] For the remainder, the brief is merely a melange of isolated extracts from various published articles purporting, mostly by hearsay, to relate facts as to the operation of a so-called "blacklist" in the motion picture industry. We assume, however, that petitioners have pleaded all of the relevant facts applicable to their situation. [See, *Faulkner v. California Toll-Bridge Auth.*, *supra*, 40 Cal. 2d at 328, 253 P. 2d at 666.] We assume further that the cause will be decided here, as it was below, on the facts in the record.

III.

Petitioners Invoke the Fourteenth Amendment to Proscribe Private Conduct, Whereas the Amendment Is Applicable Only to State Action. Thus, No Proper Question Under the Constitution Is Presented.

Axiomatically, the guaranties of the Fourteenth Amendment protect only against state action, not private conduct. [*Shelley v. Kramer*, *supra*, 334 U. S. at 13; *Civil Rights Cases*, *supra*, 109 U. S. at 10-11.] No state action is involved in the instant case. The entire complaint of petitioners—their argument as well as that of *amicus curiae*—rests on the asserted discriminatory nature of, and the economic consequences flowing from, respondents' voluntary adherence to a private agreement.

But, there is a wide gap, which petitioners and *amicus curiae* fail to bridge, between voluntary adherence to a

private agreement and the coercive enforcement of it by the state.[13] The Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful." [*Shelley v. Kramer, supra,* 334 U. S. at 13.] ". . . So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. . . ." [*Ibid.* See, also, *Barrows v. Jackson,* 346 U. S. 249, 253 and, compare, *Hughes v. Superior Court, supra,* 339 U. S. at 468-469.] At bar the state has not enforced the alleged wrongful agreement, compelled adherence to it, or imposed sanctions for a failure to perform it. It simply has not acted to make execution of or voluntary adherence to such agreements unlawful. [*Cf., Shelley v. Kramer, supra,* 334 U. S. at 19.] It follows that there is not involved in this case any *state* action infringing any constitutional right to work or abridging freedom of speech or curtailing the self-incrimination privilege. For that matter, there is not involved any state action whatever—and it is only in respect of such action that the Fourteenth Amendment may be invoked.

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[13]The decisions upon which petitioners and *amicus curiae* mainly rely were all concerned with direct and affirmative action by the state. [See, *e.g., Takahashi v. Fish & Game Commission,* 334 U. S. 410 (statute prohibiting fishing licenses to persons ineligible to citizenship); *Truax v. Raich,* 239 U. S. 33 (state constitutional provision requiring employment of large proportion of native-born citizens); *Smith v. Texas,* 233 U. S. 630 (statute fixing arbitrary requirement as condition of eligibility to act as train conductor).]

Conclusion.

No federal question was decided below. None was seasonably raised. The one which is now sought to be raised is not substantial, going, as it does, to the state's choice of competing policies rather than to any real limitation on the state's power; and involving only private conduct rather than state action. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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